

PAGES 1 - 12

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE VINCE CHHABRIA

BLACKBIRD TECH LLC D/B/A BLACKBIRD )  
TECHNOLOGIES, )  
 )  
PLAINTIFF, )  
 )  
VS. ) NO. 17-CV-6112 VC  
 )  
CLOUDFLARE, INC., )  
 )  
DEFENDANT. ) SAN FRANCISCO, CALIFORNIA  
 ) THURSDAY  
 ) FEBRUARY 8, 2018

BLACKBIRD TECH LLC D/B/A BLACKBIRD )  
TECHNOLOGIES, )  
 )  
PLAINTIFF, )  
 )  
VS. ) NO. 17-CV-6883 VC  
 )  
INCAPSULA, INC., )  
 )  
DEFENDANT. )

**TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND**

**RECORDING 11:20 A.M. - 11:33 A.M.**

**APPEARANCES:**

**FOR PLAINTIFF** BLACKBIRD TECHNOLOGIES  
ONE BOSTON PLACE, SUITE 2600  
BOSTON, MASSACHUSETTS 02108  
**BY: DAVID ALEXANDER GERASIMOW, ESQUIRE**

(FURTHER APPEARANCES ON FOLLOWING PAGE)

**TRANSCRIBED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR  
RETIRED OFFICIAL COURT REPORTER, USDC**

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**FOR DEFENDANT  
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**BY: JESSICA LEE BENZLER, ESQUIRE**

1 THURSDAY, FEBRUARY 8, 2018

11:20 A.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSELS' FAILURE TO  
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER  
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

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6 PROCEEDINGS

7 **THE CLERK:** CALLING CASE NO. 17-CV-6112, BLACKBIRD  
8 TECH, LLC, VERSUS CLOUDFLARE, INC. AND 17-CV-6883 BLACKBIRD,  
9 LLC, VERSUS INCAPSULA, INC.

10 COUNSEL, PLEASE STEP FORWARD AND STATE YOUR  
11 APPEARANCES FOR THE RECORD.

12 **MR. GERASIMOW:** DAVID GERASIMOW FOR PLAINTIFF  
13 BLACKBIRD TECHNOLOGIES.

14 **THE COURT:** GOOD MORNING.

15 **MR. GERASIMOW:** GOOD MORNING.

16 **MR. GARZA:** ANTHONY GARZA FOR DEFENDANT CLOUDFLARE,  
17 INC., AND WITH ME IS MARGAUX SAVEE.

18 AND ALSO WE HAVE SOMEONE FOR INCAPSULA.

19 **MR. SACKSTEDER:** YES. GOOD MORNING, YOUR HONOR.  
20 MICHAEL SACKSTEDER FROM FENWICK & WEST ON BEHALF OF INCAPSULA.  
21 WITH ME IS MY COLLEAGUE JESSICA BENZLER.

22 **THE COURT:** GOOD MORNING.

23 "GERASIMOV," IS THAT HOW YOU PRONOUNCE IT?

24 **MR. GERASIMOW:** "GERASIMOW."

25 **THE COURT:** SORRY. MR. GERASIMOW, I GUESS -- YOU

1 KNOW, WE'VE DONE A LOT OF BRIEFING. I GUESS MAYBE I SHOULD  
2 JUST ASK YOU TO TAKE ONE MORE CRACK AT EXPLAINING TO ME WHY  
3 THIS IS NOT AN ABSTRACT IDEA.

4 **MR. GERASIMOW:** SURE. I THINK THE --

5 **THE COURT:** AND I WANT -- I'M SORRY. LET ME ASK A  
6 SLIGHTLY MORE SPECIFIC QUESTION. I WANT IT WITH SPECIFIC  
7 REFERENCE TO LANGUAGE IN THE PATENT. SO I WANT YOU TO SHOW ME  
8 THE LANGUAGE IN THE PATENT THAT SHOWS ME THAT IT'S NOT AN  
9 ABSTRACT IDEA.

10 **MR. GERASIMOW:** SURE. AND TO CLARIFY, YOUR HONOR  
11 MEANS THE CLAIMS?

12 **THE COURT:** YES. OR ANYTHING IN THE PATENT.

13 **MR. GERASIMOW:** OKAY. I'LL START WITH THE CLAIMS.

14 THE TWO ASSERTED CLAIMS HERE ARE CLAIMS 8 AND 24.  
15 AND I THINK TAKING 24, FOR EXAMPLE, IF THE ABSTRACT IDEA IS  
16 MODIFYING IN-TRANSIT DATA, THEN WITH THIRD-PARTY DATA THEN I  
17 THINK WE HAVE A LOT IN CLAIM 24, WHICH, OF COURSE, INCORPORATES  
18 THE REQUIREMENTS OF 28 THAT DISTINGUISHES.

19 I THINK WE HAVE A PROCESSING DEVICE, AND I THINK  
20 THERE'S SOME ISSUE OF WHAT EXACTLY THAT IS. I THINK IT'S A  
21 CLAIM CONSTRUCTION ISSUE.

22 **THE COURT:** IS THERE ANY SPECIFICITY AS TO WHAT THE  
23 PROCESSING DEVICE IS, BEYOND JUST A PROCESSING DEVICE?

24 **MR. GERASIMOW:** YES. IT'S A --

25 **THE COURT:** IN THE PATENT? WHERE? WHERE IN THE

1 PATENT?

2 **MR. GERASIMOW:** IN THE PATENT --

3 **THE COURT:** YEAH.

4 **MR. GERASIMOW:** I BELIEVE THE PATENT GIVES --  
5 CERTAINLY GIVES PRIMARY EXAMPLES OF A PROXY SERVER FILTER.

6 **THE COURT:** IT GIVES A LOT OF EXAMPLES, BUT IS  
7 THERE -- IS THERE ANYTHING TO NARROW IT DOWN FROM JUST A  
8 PROCESSING DEVICE, WHAT THE PATENT CLAIMS?

9 **MR. GERASIMOW:** WELL, I THINK THAT ONE COMES TO THE  
10 PATENT WITH THE MINDSET OF A PERSON OF ORDINARY SKILL IN THE  
11 ART, AND SO I THINK THAT, IN THE CONTEXT OF INTERNET  
12 COMMUNICATIONS, IT WOULD BE LIMITED BEYOND, FOR INSTANCE --

13 **THE COURT:** SO ANY PROCESSING DEVICE THAT COULD BE  
14 INVOLVED IN INTERNET COMMUNICATIONS?

15 **MR. GERASIMOW:** PERHAPS. IT WOULD HAVE TO BE  
16 INTERMEDIATE BETWEEN THE SERVER AND THE CLIENT. AND THE CLAIMS  
17 THEMSELVES ALSO SPECIFY THAT IT'S --

18 **THE COURT:** SO ANY PROCESSING DEVICE THAT COULD BE  
19 USED -- THAT COULD BE USED AS AN INTERMEDIARY. OKAY. ANY  
20 PROCESSING DEVICE.

21 **MR. GERASIMOW:** SEPARATE FROM THE SERVER.  
22 THE PREDETERMINED PROPERTY IS ANOTHER THING. AGAIN,  
23 I THINK IT'S A CLAIM CONSTRUCTION ISSUE.

24 **THE COURT:** WHAT ARE WE -- WHAT ARE WE LOOKING AT  
25 NOW?

1           **MR. GERASIMOW:** I'M LOOKING AT CLAIM 18, THE FIRST  
2 INDENTED ELEMENTS WHICH BEGINS, "A PROCESSING DEVICE." IT'S --  
3 IN THE MIDDLE THERE'S "A PREDETERMINED PROPERTY," AND I THINK  
4 THAT'S --

5           **THE COURT:** WAIT. HOLD ON. READ ME THE LANGUAGE.

6           **MR. GERASIMOW:** SURE.

7           **THE COURT:** "PROCESSING DEVICE DISTINCT FROM SAID  
8 INTERNET SERVER FROM MONITORING SAID EXISTING DATA  
9 CHANNEL."

10          OKAY. LET'S ASSUME WE HAVE NOTHING SO FAR.

11                       "FOR A DATA COMMUNICATION HAVING A  
12 PREDETERMINED PROPERTY."

13          SO WHAT -- SO YOU'RE FOCUSING ON "PREDETERMINED  
14 PROPERTY." WHAT DOES THAT GIVE YOU?

15          **MR. GERASIMOW:** IT GIVES US THE MEANS FOR HOW ANY  
16 MODIFICATION OF A IN-TRANSIT COMMUNICATION WOULD BE DONE.

17               IF THAT WEREN'T THERE, RIGHT, WE SEE LATER ON THAT  
18 THIS DATA COMMUNICATION WITH THAT PROPERTY IS DETECTED. I  
19 THINK IN THE CONTEXT OF THE BACKGROUND SECTION, THAT THE  
20 PREDETERMINED PROPERTY ISN'T JUST ANY DATA. I THINK WITHIN THE  
21 CONTEXT OF THE PATENT IT ISN'T JUST ANY DATA. IT IS A PROPERTY  
22 OF THE PROTOCOLS GOVERNING THE COMMUNICATION BETWEEN INTERNET,  
23 CLIENT, AND SERVER.

24          **THE COURT:** OKAY. ANYTHING ELSE?

25          **MR. GERASIMOW:** YES. I THINK THERE'S THE THIRD-PARTY

1 DATA SOURCE, WHICH THE PATENT EXPLAINS IS A DATABASE, AND THAT  
2 IS CONNECTED TO THE PROCESSING DEVICE THAT --

3 **THE COURT:** SO ANY THIRD-PARTY DATA SOURCE?

4 **MR. GERASIMOW:** NO, SIR. IT WOULD BE A DATABASE  
5 THAT'S CONNECTED TO THE PROCESSING DEVICE, AND, FOR INSTANCE,  
6 ISN'T CONNECTED TO THE SERVER, WHICH WOULD BE ANOTHER WAY,  
7 POTENTIALLY, OF MODIFYING COMMUNICATIONS.

8 I THINK, FURTHER, THAT WHEN WE SEE IN CLAIM 24, THAT  
9 EMBRACES IN COMBINATION WITH THE DATA WITH THE PREDETERMINED  
10 PROPERTY, THE IDEA THAT THE PREDETERMINED PROPERTY IS A  
11 PROTOCOL PROPERTY THAT'S INDICATIVE OF AN ERROR EXPERIENCED AT  
12 THE SERVER THAT RELATES TO --

13 **THE COURT:** WAIT. SORRY. YOU LOST ME. YOU'RE  
14 LOOKING AT 24 NOW?

15 **MR. GERASIMOW:** YES.

16 **THE COURT:** OKAY. AND WHAT LANGUAGE ARE YOU LOOKING  
17 AT?

18 **MR. GERASIMOW:** WELL, I'M LOOKING AT THE CLAIM AS A  
19 WHOLE.

20 "DATA IS ONLY TRANSMITTED ON SAID  
21 THIRD-PARTY DATA CHANNEL WHEN THE DATA  
22 TRANSMISSION RATE OF SAID SERVER TO SAID  
23 CLIENT IS BELOW A PREDETERMINED THRESHOLD."

24 AND I THINK IN THE CONTEXT OF THE PATENT WHAT THAT  
25 MEANS IS -- AND, PARTICULARLY, I'M REFERRING TO COLUMN 5, AT

1 ABOUT LINE 53, END OF COLUMN 5, WHICH HELPS INTERPRET WHAT THAT  
2 CLAIM 24 IS ABOUT --

3 **THE COURT:** OKAY.

4 **MR. GERASIMOW:** -- IN CONJUNCTION WITH CLAIM 18.

5 IT'S THAT THE SERVER EXPERIENCES AN ERROR. THAT  
6 SERVER ISSUES A PROTOCOL PROPERTY THAT INDICATES THAT THERE'S  
7 AN ERROR AND THAT IT'S A TRANSMISSION-RELATED ERROR, AND IT'S  
8 THEN COMMUNICATED BACK THROUGH THE INTERMEDIATE DEVICE, WHICH  
9 DETECTS IT, AND, BASED ON THE DETECTION OF THAT PARTICULAR  
10 PROPERTY, LINKS WITH THE THIRD-PARTY DATABASE TO INCORPORATE OR  
11 MODIFY THE COMMUNICATION. FOR INSTANCE, AN ADDITIONAL  
12 EXPLANATION OF THAT ERROR THAT SERVER EXPERIENCED.

13 **THE COURT:** OKAY. WELL, LET ME GO BACK TO THAT CLAIM  
14 LANGUAGE OF 24.

15 **MR. GERASIMOW:** SURE.

16 **THE COURT:** OKAY. ALL RIGHT. ANYTHING ELSE?

17 **MR. GERASIMOW:** I THINK IF WE'RE FOCUSING  
18 SPECIFICALLY ON --

19 **THE COURT:** AND YOU'RE ASSERTING CLAIM 24 IN THIS  
20 CASE?

21 **MR. GERASIMOW:** YES.

22 **THE COURT:** OKAY. ALL RIGHT.

23 **MR. GERASIMOW:** I THINK THOSE ARE THE ELEMENTS THAT  
24 REALLY CALL OUT THE MEANS BEYOND THE SUPPOSED ABSTRACT IDEA,  
25 YES.



1           **THE COURT:**   OKAY.

2           SO WAS IT MR. GARZA?

3           **MR. GARZA:**   YES, SIR.

4           **THE COURT:**   MR. GARZA, WHAT -- ON THAT LAST POINT  
5 REGARDING CLAIM 24, CAN YOU RESPOND JUST TO THAT?

6           **MR. GARZA:**   SURE.   SO CLAIM 24 WE DON'T BELIEVE HAS  
7 ANYTHING TO DO WITH THE PREDETERMINED PROPERTY LANGUAGE ON  
8 CLAIM 18.   BUT BLACKBIRD IS CLAIMING -- AND THEY DID IN THEIR  
9 REPLY -- IS WHAT CLAIM 24 REQUIRES IS THAT THE PROCESSING  
10 DEVICE FIND A PREDETERMINED PROPERTY THAT IS AN ERROR CODE  
11 ABOUT THE RATE OF TRANSMISSION ON THE SERVER AND REACT TO THAT  
12 TO DETERMINE WHETHER OR NOT PAST DATA FROM THE PROCESSING  
13 DEVICE BACK TO THE CLIENT.

14           INSTEAD, WHAT CLAIM 24 IS ABOUT IS SHOWN AT COLUMN 3  
15 OF THE PATENT AT LINE 63.

16           **THE COURT:**   WELL, SO, LET'S GET TO THAT IN A MOMENT.  
17 BUT CLAIM 24 DOES SAY, "THE APPARATUS OF CLAIM 18,"  
18 RIGHT?

19           **MR. GARZA:**   YES.

20           **THE COURT:**   AND CLAIM 18 DESCRIBES AN APPARATUS  
21 COMPRISING A NUMBER OF THINGS, RIGHT?

22           **MR. GARZA:**   CORRECT.

23           **THE COURT:**   INCLUDING:

24                           "DEVICE DISTINCT FROM THE  
25 INTERMEDIATE SERVER FOR MONITORING SAID

1           EXISTING DATA CHANNEL FOR A DATA  
2           COMMUNICATION HAVING A PREDETERMINED  
3           PROPERTY."

4           SO YOU'RE SAYING THAT YOU DON'T BELIEVE THAT THE --  
5       THIS CONCEPT OF HAVING A PREDETERMINED PROPERTY IS INCORPORATED  
6       INTO CLAIM 24?

7           **MR. GARZA:** NO. SO IF YOU LOOK AT THE LANGUAGE OF  
8       CLAIM 24 --

9           **THE COURT:** OKAY.

10          **MR. GARZA:** IT SAYS:

11                       "WHEREIN DATA IS ONLY TRANSMITTED  
12                       ON SAID THIRD-PARTY CHANNEL."

13           SO, AGAIN, THE PREDICATE HERE IS LOOKING AT THE DATA  
14       THAT IS TRANSMITTED ON THE THIRD-PARTY CHANNEL.

15          **THE COURT:** OKAY.

16          **MR. GARZA:** AND HERE THAT'S THE DATA THAT'S SENT FROM  
17       THE PROCESSING DEVICE BACK TO THE CLIENT AND I GUESS THE  
18       PRIMARY EMBODIMENT.

19          **THE COURT:** OKAY.

20          **MR. GARZA:** IT LIMITS THAT. IT SAYS THAT ONLY  
21       HAPPENS IN A CERTAIN CIRCUMSTANCE.

22          **THE COURT:** OKAY.

23          **MR. GARZA:** WHEN THE DATA TRANSMISSION RATE OF SAID  
24       SERVER TO SAID CLIENT IS BELOW A PREDETERMINED THRESHOLD.

25          **THE COURT:** OKAY.

1           **MR. GARZA:** SO IT'S MEASURING THE BANDWIDTH. ALL  
2 IT'S DOING IS MEASURING THE BANDWIDTH AND DECIDING BASED ON THE  
3 BANDWIDTH WHETHER TO SERVE SOMETHING.

4           IT DOES NOT REFERENCE PROPERTY. IT DOES NOT  
5 REFERENCE PREDETERMINED PROPERTY. IT DOES REFERENCE  
6 PREDETERMINED THRESHOLD, BUT THAT'S SOMETHING DIFFERENT.  
7 THAT'S JUST THE PROGRAMMING. YOU KNOW, YOU PROGRAMMED A  
8 CERTAIN BANDWIDTH FOR IT TO ACT ON AND SOME NOT TO.

9           CLAIM 24 IS CERTAINLY NOT THE CRUX OF THE INVENTION  
10 HERE EITHER. IF YOU LOOK AT THE ABSTRACT AND YOU LOOK AT THE  
11 INDEPENDENT CLAIMS, IF YOU'RE TRYING TO COME UP WITH THE IDEA  
12 THAT'S BEING IMPLICATED HERE, IT IS THE IDEA OF MONITORING AND  
13 MODIFYING IN-TRANSIT COMMUNICATIONS.

14           THIS IS A NARROWING. THIS IS SOMETHING WHERE, LOOK,  
15 YOU'RE NOT GOING TO DO IT ALL THE TIME. WHEN YOU'VE GOT  
16 SOMETHING THAT YOU NOTICED AND MODIFIED, YOU'RE NOT ALWAYS  
17 GOING TO SEND IT; YOU'RE GOING TO CHECK THE BANDWIDTH FIRST.

18           BUT THAT'S NOT THE TYPE OF THING -- THAT'S NOT THE  
19 TYPE OF DEPENDENT CLAIM LIMITATION THAT IS LIKE THAT AT ISSUE  
20 IN *BASCOM* WHERE IT'S SOMETHING THAT WAS INVENTIVE, YOU KNOW,  
21 SOMETHING THAT WAS NEW, SOMETHING THAT FURTHERED THE POINT OF  
22 THE INVENTION.

23           THIS IS MORE LIKE AN XML CODE. THIS IS MORE LIKE A  
24 NARROWING, JUST LIMITING THE SCOPE OF THE INVENTION TO CERTAIN  
25 FIELDS AND CERTAIN TIMES.

1           **THE COURT:**   OKAY.   DO YOU WANT A LAST WORD?

2           **MR. GERASIMOW:**   SURE.   I THINK IT'S CLEAR THAT  
3   CLOUDFLARE COUNSEL RAISES A CLAIM CONSTRUCTION ISSUE ABOUT WHAT  
4   THESE MEAN.   I THINK THAT I REFERENCED COLUMN 5 BEFORE.   THAT'S  
5   WHAT'S BEING EXPLAINED HERE, AND WHAT IS CAPTURED.   THERE'S NO  
6   SUPPORT FOR A SUBSTANTIALLY BROADER READING OF CLAIM 24.

7           ALSO, SAY THAT THE XML CODE THAT CLOUDFLARE COUNSEL  
8   MENTIONED IN -- I BELIEVE IN REFERENCE TO THE *ERIE* CASE THAT  
9   YOUR HONOR ASKED ABOUT.   THIS IS NOT A NARROWING.   THIS IS AN  
10   INVENTION HAVING TO DO WITH THOSE SERVER RELATED ERRORS THAT --  
11   I'M SORRY -- SERVER ERRORS RELATED TO BANDWIDTH TRANSMISSION  
12   RATES.

13           SO IT DIDN'T JUST DO THIS WITH XML OR ANY OTHER  
14   PROTOCOL.   IT IS THE USE OF THE PROTOCOL THAT IS INVENTIVE AND,  
15   IN PARTICULAR, THE USE OF A PROTOCOL INDICATIVE OF A  
16   TRANSMISSION RATE ERROR AT THE SERVER.

17           **THE COURT:**   OKAY.   I'LL GIVE IT A LITTLE BIT MORE  
18   THOUGHT AND THEN ISSUE AN ORDER.   THANK YOU.

19           **MR. GERASIMOW:**   THANK YOU.

20           **MR. GARZA:**   THANK YOU.

21           (PROCEEDINGS ADJOURNED AT 11:33 A.M.)  
22  
23  
24  
25

CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT  
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF  
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE  
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE  
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE  
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,  
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN  
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT  
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE  
ACTION.



JOAN MARIE COLUMBINI

FEBRUARY 28, 2018